

STATE OF MICHIGAN
COURT OF APPEALS

JOHN D. VIDICAN, JR. and WILFRED H.
BURKE II,

UNPUBLISHED
December 1, 2000

Plaintiffs-Appellants,

v

CHARLES H. WRIGHT, MARY E. MOORE,
EARNEST GASS, and CORA M. BAKER,

No. 215806
Monroe Circuit Court
LC No. 97-006605-CK

Defendants-Appellees.

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We affirm.

This breach of contract suit arose out of an agreement that granted plaintiffs an option to purchase a subdivision from defendants. The option agreement contained four conditions that required the acquisition of governmental approval and permits for development before the option to purchase the real estate could be exercised. Although these conditions were not satisfied, plaintiffs unilaterally waived the conditions and attempted to exercise their option to purchase. Defendants refused to go through with the sale and this breach of contract action followed. The trial court ruled that the benefits of the conditions inured to both parties and therefore could not be unilaterally waived. Since there was no effective waiver and the conditions were not satisfied, the court concluded that the option expired according to its terms and there was no breach of contract.

On appeal, plaintiffs contend that the trial court erred in granting summary disposition for defendants because questions of fact existed regarding the validity of plaintiffs' waiver of the four conditions of the option agreement. This Court reviews the trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). If a contract is clear and unambiguous, its meaning is a question of law; if the language is unclear or is susceptible to multiple meanings, interpretation is a question of fact. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). We conclude that the trial court did not err in granting summary disposition because there were no genuine issue of material fact, and under the contract provisions, defendants were

entitled to judgment as a matter of law. The option was clear and unambiguous in its terms and the benefit of the conditions inured to all parties and therefore could not be unilaterally waived by plaintiffs.

In order to determine whether plaintiffs could unilaterally waive the conditions in the opinion it must first be determined who stood to benefit from the conditions. This is dispositive because

the party for whose benefit a condition is inserted may, at his or her option, waive it, even absent contractual language to that effect, though a party cannot waive a condition precedent which is not solely for his or her benefit, or was inserted in the contract for the benefit of the other party to the contract.” [92 CJS, Vendor and Purchaser, § 125, p 204.]

An option is a preliminary contract for the privilege of purchase and not itself a contract of purchase. *Twp of Oshtemo v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). An option consists of two distinct elements: “(1) the offer to sell which does not become a contract until accepted, and (2) the completed contract to leave the offer open for the specified time.” 92 CJS, Vendor and Purchaser, § 98, p 143. Thus, an option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time. *Oshtemo Twp, supra* at 37. Generally, an option contract for purchasing real property is a mere offer that requires strict compliance with the terms of the option both with regard to the exact thing offered and within the time specified. *Id.*

Here, the option contract contained specific contingencies or conditions precedent that had to be performed before the offer to sell could be accepted. These contingencies had to be fulfilled or the contract of sale could not come into existence. *Knox v Knox*, 337 Mich 109, 118; 59 NW2d 108 (1953). The option to purchase and real estate agreement specifically stated in Section 3 that “the option shall be exercised following receipt of all necessary governmental approvals and permits for the development of the property.”

If, as defendants argued and the trial court ruled, the benefit of the conditions requiring governmental approvals inured to all parties, then plaintiffs could not unilaterally waive the conditions, and because they were never satisfied, the option expired by its terms. Plaintiffs, however, contend that *Brotman v Roelofs*, 70 Mich App 719; 246 NW2d 368 (1976), requires a different result. In *Brotman*, the plaintiff contracted to purchase property from the defendants to develop it as a trailer park, subject to the township issuing a permit to construct the park. *Id.* at 722. The zoning authorities refused to issue the permit and the defendants sought to secure a release from the contract by arguing that because the condition of obtaining zoning approval had not been satisfied, the agreement expired. *Id.* The plaintiff still wanted to purchase the property and brought suit for specific performance. *Id.* at 723. The trial court ordered specific performance, ruling that “since the condition of zoning approval was requested by [the] plaintiff, it was solely for [the] plaintiff’s benefit and could be waived by [the] plaintiff,” and this Court affirmed. *Id.* at 723-725.

In the instant case, the trial court found *Brotman* distinguishable based on two important considerations. First, the court thought it important that the agreement in *Brotman* included

provisions for a down payment plus scheduled payments at specific interest rates that provided the seller with payments irrespective of the purchasers' ability to market the trailer park. Here, the sellers could only receive payment if the purchasers were successful in disposing of the individual subdivision lots. The trial court was correct in finding as reasonable the inference that the sellers would demand that the development of the individual lots was authorized prior to transferring the subdivision property to the purchasers.

Second, the *Brotman* holding was predicated on the conclusion that the condition was included for the sole benefit of the purchaser while in the instant case, the requirement of governmental approval was determined by the trial court to

at best provide benefits for both parties, but it is clear that the conditions do certainly serve the benefits of the sellers, therefore waiver would require consent from the sellers and could not be unilaterally waived by the plaintiffs as is being suggested here.

This analysis is correct because the permits were a necessary precondition to the sale of any lots in the subdivision and eventual payment to defendant, thus providing a benefit to both parties. Thus, we agree with the trial court that *Brotman* is factually distinguishable since it applies to circumstances where the purchaser is the sole beneficiary of the conditions and is required to make payment independent of his eventual use or disposition of the land. Where, as here, all parties benefit from the conditions and there is a continuing relationship after transfer, the holding of *Brotman* is inapplicable.

In the trial court, plaintiffs correctly stated, and defendants conceded, that their agreement did not require payment as a condition precedent to exercising the option, but it did explicitly require satisfying the conditions before the option could be exercised or the parties waived the conditions. Plaintiffs have made no showing that the benefits of the conditions were theirs solely and could be waived unilaterally. Both parties agree that payment was to be made over an extended period and conditioned on the sale of individual parcels. Plaintiffs go further and concede that that the governmental approval would facilitate development, yet contend that the benefits of the conditions are theirs alone. We find this position to be inconsistent. If payment to defendants were conditioned on sales and the governmental approval and permits would facilitate those sales, then the approval and permits benefited all parties.

The words of the contract are clear and unambiguous: "The option shall be exercised following receipt of all necessary Governmental approvals and permits for the development of the property." Whenever contractual language is clear and unambiguous, it is construed according to its plain meaning. *Amtower v Williams C Roney & Co (On Remand)*, 232 Mich App 226, 234; 590 NW2d 580 (1998). Furthermore, it is apparent that the requirement that the conditions be satisfied was of significant import to all parties because any failure to satisfy them was included in Section 3 of the agreement as a reason for non-enforcement of the option and a return of the deposit.

Plaintiffs in their deposition conceded that they did not receive all the required governmental permits nor final approval for the development from Frenchtown Charter Township and Monroe County Planning Commission as required by their agreement. The

language of the option explicitly and unambiguously stated that any exercise of the option is conditioned on satisfaction of the conditions precedent. These conditions precedent could not be unilaterally waived by plaintiffs because the benefits of the conditions inured to all parties. The failure to satisfy the conditions caused the option to expire according to its terms. Summary disposition for defendants was appropriate.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ Gary R. McDonald